IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	No. 604, 2011
Plaintiff Below Appellant,	)	
	)	Court Below: Superior Court
v.	)	of the State of Delaware in
	)	and for New Castle County
MICHAEL D. HOLDEN,	)	
	)	Cr. ID No. 110400 3419
Defendant Below Appellee,	)	
STATE OF DELAWARE,	)	
	)	No. 605, 2011
Plaintiff Below Appellant,	)	
	)	Court Below: Superior Court
v.	)	of the State of Delaware in
	)	and for New Castle County
LAUREN N. LUSBY,	)	
	)	Cr. ID No. 110400 3415
Defendant Below Appellee.	)	

Submitted: April 11, 2012
Decided: July 10, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

Upon appeal from the Superior Court. **REVERSED** and **REMANDED**.

Paul R. Wallace (argued) and Morgan T. Zurn, Department of Justice, Wilmington, Delaware for appellant.

John P. Deckers (argued) and Thomas A. Foley (argued),Wilmington, Delaware for appellees.

STEELE, Chief Justice:

When reviewing a motion to suppress the evidence police discovered while executing a search warrant, Superior Court judges should give substantial deference to the magistrate's finding on the existence of probable cause. Resolution of this case requires elaboration about the meaning of "substantial deference." We hold that substantial deference means that if some facts in the affidavit of probable cause support the inference that evidence of criminal activity exists in a particular place, the Superior Court judge should affirm the issuance of a search warrant. Consequently, we reverse the Superior Court judgment granting the motion to suppress, and remand the case for further proceedings consistent with this opinion.

FACTS

This case focuses on whether a Justice of the Peace properly granted a search warrant based on the information in the affidavit of probable cause placed before her. Given the procedural posture, we accept the facts as described in the affidavit of probable cause.

On February 24, 2010, a Drug Enforcement Administration Task Force stopped Michael Holden's car and discovered 12 pounds of marijuana. The State brought charges against Holden, but a Superior Court judge granted a motion to

suppress the marijuana, finding that "the warrantless placement of a GPS device to track a suspect 24 hours a day constitutes an unlawful search."[1] Without that evidence, the State entered a *nolle prosequi* on the charges.

Later, two confidential informants tipped the Wilmington Police Department that Holden dealt drugs. The affidavit of probable cause in question here described both of the informants as past proven and reliable. The first informant stated that Holden never stopped selling marijuana after his earlier described arrest, and that Holden was then selling both marijuana and oxycodone from his house in Newark. The informant provided additional information: that Holden lived at a particular address in Newark with his girlfriend Laura Lusby, that Holden was driving a white Chrysler registered to Lusby's father, and that Holden had a male roommate.

The second informant said that Holden continued selling marijuana, multiple pounds at a time, and that he also sold both cocaine and oxycodone by the ounce. The second informant agreed that Holden now sold drugs from his house in Newark, where he also kept his stash. He also said that Holden was driving a Chrysler 300M with Maryland registration, and that Holden was living with his girlfriend, a heavy-set "white" woman.

[1] *State v. Holden*, 2010 WL 5140744, at *1 (Del. Dec. 14, 2010).

After receiving those tips, officers verified them in part. Holden's driver's license showed that he did live at the address described in Newark. Officers saw Holden leave the house and drive off in a white Chrysler 300.

On April 4, 2011, officers with the DEA Task Force watched Holden and Lusby's house. A man pulled into the driveway in a silver Chrysler and stayed in his car. Within five minutes, Holden returned to the house, parked his car in the driveway, and went inside, accompanied by a passenger from his car and the man from the silver Chrysler. About ten minutes after he entered the house, the man from the silver Chrysler returned, and drove off.

Officers followed the man in the silver Chrysler. He pulled into a shopping center, parked his car, walked to the passenger side, and placed "what appeared to be small objects in his right hand."[2] An officer approached the man and identified himself, at which time the man "quickly clasped both hands."[3] Fearing the man would attempt to throw away the objects in his hand, the officer grabbed his hand, and discovered six oxycodone pills. The officer identified the man as Vincent Pfeiffer. Pfeiffer claimed he had a prescription bottle for the pills in the car, but

[2] Rentz Aff. of Probable Cause, Op. Br. App. at ¶ 9.

[3] *Id.*

officers did not discover one. Pfeiffer "was also deceptive with officers when asked where he was coming from."[4]

An officer then prepared and submitted the affidavit, and secured a search warrant. Officers executed the warrant the same day as Pfeiffer's arrest, on April 4, 2011. When the officers arrived, Holden ran into the backyard. Lusby began to run, but stopped when an officer threatened to release a dog. In a common area, officers found marijuana, a sifter for grinding marijuana, and a digital scale. In Holden and Lusby's bedroom, police found a 59.47 gram chunk of cocaine, cocaine residue, and empty prescription bottles for oxycodone. The State filed charges against Holden and Lusby.

After a grand jury indicted Holden and Lusby, a Superior Court judge consolidated the cases to determine whether the magistrate properly granted the search warrant. The Superior Court judge determined the warrant should not have been issued because the affidavit in support of the warrant did not establish probable cause. The State appealed from that finding.

"Where the facts are not in dispute and only a constitutional claim of probable cause is at issue, we review the Superior Court's ruling *de novo*."[5]

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[4] *Id.*

[5] *LeGrande v. State*, 947 A.2d 1103, 1108 (Del. 2008) (citations omitted).

DISCUSSION

This appeal focuses narrowly on whether the Superior Court judge granted an appropriate level of deference to the magistrate's determination that the affidavit provided sufficient facts to justify the issuance of a search warrant.

A magistrate determines whether probable cause exists to issue a warrant by examining the information contained within the four corners of the affidavit of probable cause. The United States Supreme Court described the basic test in *Illinois v. Gates*:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[6]

The Court in *Gates* went on to require that an affidavit "provide the magistrate with a substantial basis for determining the existence of probable cause," saying that a "wholly conclusory statement" will not meet this requirement.[7]

Delaware applies the *Gates* test, and emphasizes the difference between probable cause to believe evidence of criminal activity exists in a particular place and the certainty that the evidence sought may be found there: "This test, however,

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[6] *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332 (1983).

[7] *Id*. at 239; *Rivera v. State*, 7 A.3d 961, 967 (Del. 2010) ("Although this Court will not simply rubber stamp a magistrate's conclusions, our review need only ensure that the magistrate had a substantial basis for finding that probable cause existed." (quotations omitted)).

is less rigorous than that governing the admission of evidence at trial. A finding of probable cause only requires the proponent to show a probability, and not a *prima facie* showing, that criminal activity occurred."[8] For example, in *Jensen v. State*, this Court upheld a warrant granted 27 days after the crime occurred, even though the evidence of the crime might well have disappeared in the intervening period, because "[t]he magistrate could reasonably have concluded that the specified items were presently in the places to be searched."[9] We enforce the Fourth Amendment's requirement that magistrates make decisions that are reasonable, not unassailable.[10]

With this description of the applicable rule in mind, it is important to remember that the United States Supreme Court instructs courts that review a magistrate's decision to issue a warrant to grant deference to the magistrate's decision. This tendency emerges from the United States Supreme Court's concern that courts should not lightly declare officers to have acted illegally when they follow proper procedure.[11]

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[8] *Purnell v. State*, 979 A.2d 1102, 1108 (Del. 2009).

[9] *Jensen v. State*, 482 A.2d 105, 112 (Del. 1984).

[10] *Gates*, 462 U.S. at 238-39.

[11] *Gates*, 462 U.S. at 236 ("A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant. . . ." (citations omitted)).

We hold that judges reviewing a magistrate's decision to issue a search warrant must show substantial deference to the decision to issue a warrant by affirming its issuance so long as some evidence in the record supports the finding of probable cause, even if the absence of other information from the affidavit might suggest that a reviewing judge could draw a negative inference about probable cause based on the facts not discussed.

In this case, the affidavit of probable cause provided evidence from which the magistrate could conclude probable cause existed to suspect the police would find evidence of criminal activity in the house described in the warrant. Two confidential informants stated that Holden sold drugs from the house, including oxycodone. When officers stopped Pfeiffer and discovered his oxycodone, they discovered information tending to corroborate these tips.

A tip from a confidential informant can provide probable cause, if the totality of the circumstances demonstrates the tip's reliability.

> An informant's tip may provide probable cause for a warrantless arrest where the totality of the circumstances, if corroborated, indicates that the information is reliable. In making that determination, a court must consider the reliability of the informant, the details contained in the informant's tip, and the degree to which the tip is corroborated by independent police surveillance and information.[12]

[12] *Cooper v. State*, 32 A.3d 988, 2011 WL 6039613, at *5 (Del. Dec. 5, 2011) (TABLE).

In past cases, we have held that accurate prediction of future movements adequately corroborates a tip even from an anonymous informant.[13] Corroboration of an informant's tip about a suspect's movements suggests that the informant possesses knowledge of the suspect's criminal behavior, because the informant knows the person well enough to know what they will do. Through a different logical process, the officer's discovery of oxycodone on Pfeiffer corroborates the two informants' tips that Holden sold drugs, because from those tips follows the prediction that people would arrive at his house and leave with drugs. The corroboration suggests the informants knew officers could find drugs at Holden's house.

The Superior Court judge focused on two shortcomings in the affidavit. First, the affidavit did not mention a high level of foot traffic, as one of the informants predicted.[14] Second, the police could not establish whether Pfeiffer obtained the drugs at Holden and Lusby's house.[15] But a magistrate need not

[13] *Cooper v. State*, 32 A.3d 988, at *6 ("The CI predicted that Cooper would arrive at 14th Street and French Street . . . ."); *Tolson v.* State, 900 A.2d 639, 643 (Del. 2006) ("Specifically, Allen was able to predict details of Tolson's behavior that supported the conclusion that Allen was truthful."); Miller v. State, 25 A.3d 768 (Del. 2011).

[14] *State v. holden*, 2011 Wl 4908360, at *5 (Oct. 11, 2011) ("It is also important to note that although both confidential informants claimed Holden was selling drugs from his home, during surveillance over a significant period of time (on three separate occasions) the police only saw one person come to Holden's home. The police never observed the 'foot traffic' typically associated with drug sales from a home and the neighbors never complained to the police of drug activity at Holden's home.").

[15] *Id*. at *6 (finding no basis to decide if the drugs were in Holden's house, because "the alleged sale did not take place during a controlled buy.").

conclude that every portion of a tip is correct, only that it is sufficiently corroborated to provide a reasonable basis to think that Holden probably kept drugs at the house.

A magistrate need not possess near certainty, but only a reasonable basis to believe that drugs could be found at the location to be searched.[16] Alternative explanations for the events recounted in the affidavit of probable cause remain possible. Perhaps Pfeiffer did have a prescription, or perhaps he possessed the pills illegally but did not obtain them from Holden and Lusby. Our ruling does not depend on certainty that Pfeiffer purchased the drugs, illegally, from Holden and Lusby at their house. Because we do not require certainty, a controlled buy need not be established for probable cause to exist. So long as a magistrate has a substantial basis for her decision about whether probable cause exists, a reviewing court should not find that she improvidently issued the warrant and therefore grant a motion to suppress the evidence seized pursuant to that warrant.

That rule holds even though another portion of one of the informants' tip was not corroborated. Police did not observe a high level of foot traffic. But they did find oxycodone on a person who made a brief visit to the house and then dissembled about the location he had recently left. That discovery provided

[16] *Gates*, 462 U.S. at 238-39.

sufficient corroboration of the remainder of the tip to justify a magistrate issuing a search warrant.

CONCLUSION

We reverse the Superior Court's order suppressing the evidence discovered during the April 4, 2011 search, and remand the case for further proceedings consistent with this opinion.